No. 183.

By. of Dupuy for D. C.

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IN THE

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OCTOBER TERM, A. D. 1899.

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JOHN W. ARNOLD,
Plaintiff in Error,

vs.

LEWIS HATCH,
Defendant in Error.

In error to the United States Circuit Court of Appeals for the Seventh Circuit.

Brief and Argument for Defendant in Error.

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Brief and Argument for Defendant in Error.

AS TO THE FACTS IN THE CASE.

MAY IT PLEASE THE COURT:

Defendant in error objects to the statement of facts furnished in the brief of counsel for plaintiff in error.

The record shows that on the 21st day of August, A. D. 1897, John A. Logan, a deputy United States marshal, appeared on the farm of Lewis Hatch with an execution against the goods and chattels of one Frank W. Hatch and made a pretended levy on the property of Lewis Hatch; that Lewis Hatch was then and had been for many years the owner of this farm, and was then the owner and in possession of the live stock and chattels

levied on. The further facts necessary to be understood are set out in the statement of facts made by the judge before whom the case was tried, and also the statement of facts made by the United States Circuit Court of Appeals, both of which statements are contained in the opinion filed in this case in the last named court upon the first hearing.* These statements of facts should be thoroughly satisfactory to this court in view of the fact that the trial court, on the facts so stated by it, directed a verdict in favor of the plaintiff in error, while the Court of Appeals reached the opposite conclusion as to the rights of the parties, and rendered a decision in favor of the defendant in error. The statement of facts as thus made by his Honor Judge SEAMAN, of the District Court, before whom the case was tried, was made upon the trial, after having patiently heard all the evidence in the case, and with all the testimony fresh in mind. The statement of facts as made by his Honor Judge WOODS, of the Court of Appeals, was made after careful examination of the record, and is contained in the opinion which reversed the decision of the lower court. With these statements of facts the defendant in error is content. We quote them from the opinion in the case of

Hatch v. *Heim*, 58 U. S. Cir. Ct. of Appeals, 546, 547.

> "The essential facts of the case are that in 1883 Lewis Hatch, being the owner of a large and well-stocked farm on which he then had and has ever since maintained his home, entered into an agreement with his son, Frank W., then just out of school, whereby the latter was to take the control and management of the farm and implements of husbandry and of the live stock thereon, maintain repairs, pay

* *Hatch* v. *Heim*, 58 C. C. App., 544. See opinion on second hearing, *Arnold* v. *Hatch*, 60 C. C. App., 659.

taxes, replace stock disposed of, and have as his own the net proceeds, each party being at liberty to terminate the arrangement at any time. The testimony of the father and the son to that effect is harmonious, and was not materially affected, so far as we perceive, by other testimony or by the proof of other facts, such as their returns of property for taxation, and the disposition made by them of wool which had not been levied upon. The court in its charge stated the arrangement as follows: 'Mr. Lewis Hatch was then approaching his seventieth year, according to the testimony, and desired to retire from active work. He said to his son: "Now, here is the farm" (in effect. I am not attempting to quote the language, but in effect). "Now, here is this farm of some 700 acres, and here is all of this stock, farming implements, and property on the farm; I want you to take it; I want you to do well by it; you shall receive all of the income or revenue which is derived out of it, in other words, all the benefits which accrued from the use of the farming property, subject, however, to the payment of all taxes, to the keeping up of repairs, and that the property itself, both farm and personal property, shall be kept up, so that at the termination, whenever that shall be, there shall be left here as much of the personal property, stock, etc., as I turn over to you."' The farm was conducted under this arrangement, the son living with the father, until 1886 or 1887, when, having married, Frank removed to Texas, but after some months returned at the request of his father and resumed control upon the same terms and conditions as before, except that he lived in a separate house built on the farm for his use. In November, 1892, he went away again, going to the State of Washington, where he incurred the liability for which the judgment was taken, for the satisfaction of which the property in question was seized on execution; but whether in that instance there was a complete and intended abandonment of the farm and property thereon, as when he went to Texas, is not clear, but in the view we take of the case, the question is not important."

We beg leave, however, to call the attention of the court to the *following additional facts* not contained in the brief outline above quoted, namely, that Hatch, Sr., owned this farm for more than twenty-five years (Rec., 26); that he made his homestead there in 1875, and had lived there ever sinoe that time; that he is a very old man—past eighty-four years old at the time of the hearing of this cause (Rec., 41); that this arrangement was made with Frank Hatch in 1883 or 1884, when he was a young man (Rec., 41), just out of school, unmarried, living with his father in the same house; that he continued to live with his father several years after this arrangement was entered into (Rec., 41); that the board of the hired men on the farm was all furnished by the father until after Frank Hatch was married; that after Frank returned from Texas, in 1887, he and his wife continued to live in the house with the father for a year or two, Frank having no other place of residence on the farm; that subsequently Frank's wife not being satisfied with that arrangement, he built a house—which in the testimony is called the "little house" (Rec., 49)—for their use, about twenty or thirty rods distant from the father's homestead (Rec., 48); that some of the hired men still lodged in the house of Lewis Hatch; that Lewis Hatch has lived on this farm ever since 1875 continuously; that in 1887 Frank Hatch gave up the arrangement and moved with his family and all his belongings to Texas, with the intent of making his home there (Tr., p. 59); that he bought property and settled there, and that upon going to Texas he left all of the stock on the farm just as he had received it from his father, not selling anything or attempting to sell anything (Tr., p. 59); that subsequently he was dissatisfied with Texas; that his

father wrote him while there, "Now, as to your coming back, I have not a word to say; I have said all that was necessary before you went away, You know what the terms are; there is nothing different from what they were, from what they have been formerly." The original of this letter, together with the envelope in which the same was sent, was introduced in evidence (Tr., p. 69); the postmark shows that it was "Received at Paris, Texas, May 6th, 12 o'clock M., 1887." (See Transcript, p. 69.*) That the arrangement referred to in the letter was the former arrangement between Frank Hatch and Lewis Hatch, as shown in the testimony on trial (Tr., p. 83); that subsequently Frank Hatch returned and a new arrangement was made, but on the same terms as before (Tr., p. 60); that Frank continued to manage the farm until 1892, at which time he went to the State of Washington for the purpose of locating; he invested in real estate and personal property in the State of Washington at that time, leaving all the stock on the farm, without selling or attempting to sell any of it, the same as he had done before (Tr., pp. 43, 44, 60 and 61. Frank again resumed management of the farm on the same terms as before (Tr., p. 44); that both during the time he was absent in Texas and also while he was in Washington, the management of the farm remained with Lewis Hatch.

II.

We apprehend, however, that the foregoing statement at length of facts involved is unnecessary because:

This court on appeal or error will not review questions of fact.

*For correction of transcript by leave of court see Rec., p. 118.

This doctrine was stated with great explicitness and in the most formal manner by this court, after very full consideration, in the case of

Hepburn v. *Dubois*, 12 Peters, 376,

where the court, referring to the provision contained in the seventh amendment of the constitution, namely, "In suits at common law, where the value in controversy shall exceed $2,000, the right of trial by jury shall be preserved, and no fact shall be otherwise examined in any court of the United States than according to the rules of the common law," said:

> "That where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence which the law authorizes a court to infer on a demurrer to the evidence; after a verdict in favor of either party, on the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part or the whole of his case. If, in its judgment, the Appellate Court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferrable therefrom; in the same manner, and with the same legal results, as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole evidence in a cause must be taken as negativing all facts, which the party against whom their verdict is given had attempted to infer from, or establish by the evidence."

This doctrine has been announced in almost numberless cases since the above decision. Some of the later case are:

Barredo v. *Silsby*, 21 Howard, 146,

where it was said:

> "Repeated decisions of this court have affirmed the doctrine which is but a repetition of the constitutional provision upon the subject, that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law; and it is well known that the only modes known to the common law of re-examining the facts of a case after they have been found by a jury or the granting of a new trial by the court, where the issue was tried, or to which the record was properly returnable, or by the award of a venire *facias de novo* by the appellate court for some error of law which intervened in the proceedings. * * * Whether the evidence, when offered, is admissible is a question for the court, but when admitted the question whether it is sufficient or not is for the jury, and it is their province to draw from it all such inferences and conclusions as it conduces to prove and which, in their judgment, it does prove, and their finding is conclusive, unless a new trial is awarded by the court, in which the case is tried, or in the appellate tribunal for some error of law. Guided by these principles it must be assumed in a further examination of this question that the facts are as they have been found to be by the jury."

This doctrine is so fundamental that further quotation of authorities is unnecessary. We therefore only cite the following cases in which the same doctrine has been announced:

Hyde v. *Stone*, 61 U. S., 170 (20 Howard, 170).

Northwestern Union Packet Co. v. *McCue*, 17 Wallace, 508.

Sturr v. *Beck*, 133 U. S., 541.

Fishburn v. *C., M. & St. P. Ry. Co.*, 137 U S., 60.

Town of Andes v. *Slossen*, 130 U. S., 435.
Johnson v. *Jones*, 66 U. S., 209.
Wilson v. *Everett*, 139 U. S., 616.
Ætna Life Ins. Co. v. *Ward*, 140 U. S., 76.

Under the doctrine of this decision we are entitled to respectfully insist that this court examine this evidence only to see whether it "*conduces*" to support the finding of the jury, and to ask this court to consider as established in favor of the defendant in error the most favorable view of the case that the evidence will support; in other words, the facts in the case, after the verdict of the jury, are to be *conclusively considered as consisting of those most favorable to the contention of the defendant in error;* and the evidence is to be taken as "*negativing all facts which the party against whom their verdict is given had attempted to infer from or establish by the evidence.*" Should this court adopt any other rule it would destroy the effect of the constitutional provision above referred to, and result in an examination of facts otherwise than as therein provided. "*Whether the evidence when offered is admissible is a question for the court, but when admitted, the question whether it is sufficient or not is for the jury, and it is their province to draw from it all such inferences and conclusions as it conduces to prove and which in their judgment it does prove;* and their finding is conclusive unless a new trial is awarded," etc.

This, then, being the recognized rule of law what is its application to the case at bar? There was direct and positive testimony in the case (much of which was entirely undisputed) to the effect that this farm was in the possession of Lewis Hatch at the time this levy had been made, and had continuously been for more than twenty-

five years; that this personal property was on the farm, and was in the possession of Lewis Hatch at the time the levy was made; that the property so seized by the marshal belonged to him, and did not belong to Frank Hatch, and never had belonged to him; that Frank Hatch was a manager and not a tenant of the farm. On these points, testimony, which has already been quoted in part, was as follows:

Testimony of Lewis Hatch:

> Q. Whose farm is it? A. It is mine.
>
> Q. How long have you owned that farm? * * * A. Some twenty-five years.
>
> (Rec. 27.) I built there new in 1875, and I have lived there ever since.
>
> Q. You were then living on the farm at the time this execution was levied on the property I have mentioned on August last? A. Yes, sir.
>
> Q. I will ask you whether or not you were in possession of this personal property situated on the farm, being the property I have mentioned, at and prior to the time that execution was levied? A. I was in possession of it, and have always been in possession of it. It has never been out of my possession.
>
> Q. You stated, Mr Hatch, that you had always been in possession of that property? A. I have, sir.
>
> (Rec., 28.) Q. And that all that property belonged to you at the time it was levied upon? A. It did, sir. * * *
>
> My son was my manager at that time, and had been for several years. * * * I had him engaged for an overseer, boss, or whatever you might call him. * * * He transacted all my business.

Frank W. Hatch (Rec., 40, 50):

> "Louis Hatch had lived on this farm since 1875, continuously. He is the owner of this farm; he was the owner of this personal property mentioned in the petition filed in this case; at and prior to the

> time of the levy of the execution it was in the possession of Lewis Hatch."

There is nothing whatever to contradict these facts except the inferences to be drawn from other facts which are supposed to be inconsistent with these primary facts. We shall not attempt to notice or examine these in detail, for if it be borne in mind that Frank Hatch was to receive all the earnings of this farm as his remuneration for taking care of it, instead of a stated salary, it will be apparent that there is no conflict whatever. This will be alluded to hereafter. The jury having found in favor of the defendant in error, the above facts are to be considered as established. If said facts are established in law, it is plain that the plaintiff in error has no standing in this court, and that this court will affirm the judgment.

We beg to have the court consider somewhat more in detail the questions that were in issue upon the trial of this cause. In the sworn petition filed by Lewis Hatch, he declares himself *to have been the owner of this property at and prior to the time of the levy of the execution* (Rec., 9), and the marshal, in his answer, *denies that at or prior to the time of the levy and at the time of the filing of the answer, said Lewis Hatch was the owner, but alleges that Frank Hatch was the owner of the property.*

Reference to the *testimony* in the case at this point has already been referred to in the preceding paragraphs.

His Honor Judge ALLEN, in defining the issues to the jury, said:

> "This is in effect a suit to try the title of the property, which was levied on by the execution, whether it was in the defendant, Frank Hatch, or whether it was at the time of the seizure in the petitioner, Lewis Hatch, and therefore your verdict will be in one or the other of the following forms:

We, the jury, find the property subject to execution, or

We, the jury, find the right to the property in the complainant, Lewis Hatch." (Rec., 105.)

The jury returned a verdict:

"We, the jury, find the property in the petitioner, Lewis Hatch." (Rec., 15.)

It therefore clearly follows that on this hearing, and for the purposes of this review by this court under the authorities above quoted, the only question for this court to consider is whether or not the evidence was sufficient, *i. e.*, *conduces*, to sustain the verdict. If so, the verdict is tantamount and a finding in favor of the petitioner of all the facts that were directly in issue and all such facts as were legally inferable therefrom,

> "with the same legal results as if they had been found and definitely set out in a special verdict. And the verdict must be taken as negativing the facts which the party against whom their verdict is given has attempted to infer from or establish by the evidence."

III.

ARGUMENT

(*a*)

Counsel for plaintiff in error, on page 13 of his brief, has stated the contentions made by him, which he desires this court to sustain, as follows:

> "*The contest in support of the execution levied has been prosecuted on the theory that under the contracts made by these two men, Lewis Hatch was the landlord and Frank W. Hatch the tenant, the holding being a tenancy at will. To sustain the position that the son was the servant of his father, the defendant*

in error must establish that under this contract the control of the farm and personalty was reserved to the father. This may well be said to be the main point of the whole inquiry."

While defendant in error contends that the principle of law which governs in all this class of cases is:

"*Where the possession of the property by the one using it is only an incident to his employment, the better to enable him to discharge the duties of his employment, the relation of landlord and tenant does not exist.*"

We think this will be made plain by the following considerations:

At the time this arrangement was made between Lewis Hatch and Frank W. Hatch, *the latter was a young man, just out of school, unmarried, and residing at home with his father. He continued to reside with his father until his marriage, and until after this agreement had once been broken up and terminated by his removal to the State of Texas for the purpose of permanently locating there.* Upon his return he again resumed the former arrangement without any alteration in its terms, and he and his wife lived some years in the father's homestead. Subsequently, he built a house, as hereinbefore stated, for his own use.

Could such an arrangement as this, by any possibility, if it were an open question not concluded by the verdict of the jury, constitute a tenancy between the Messrs. Hatch? The elder Hatch owned the farm; had owned it for twenty-five years previous to the time this arrangement was made; lived on it with his family and had continued to live on the farm in the homestead until the present time.

If a tenancy was created by this agreement, of what

did Frank become a tenant? Did he become a tenant of the whole farm, or a part of it? Did he become a joint tenant with Lewis Hatch of the homestead and house, or did he become a sole tenant thereof, or did the right of possession and occupation remain in Lewis Hatch? If Frank Hatch became a tenant of the farm, exclusive of the homestead buildings, what defines the limit of his holdings? These questions at once indicate the impossibility that Frank Hatch could at that time have become a tenant of the farm. If he did not become a tenant of the farm *at once, upon the making of this contract*, he certainly never *afterward* became a tenant, because no change was ever made in the terms of the contract between the two men. We have no hesitation in saying that such a construction placed upon the arrangement made between the two men is unquestionably contrary to their intent, and is not warranted by any evidence which appeared in the case. The court therefore was fully warranted in its instruction in using the language of which complaint is made, in which the jury were told that if they believed from the evidence "the arrangement between Lewis Hatch and Frank W. Hatch under which the farm was operated and carried on was substantially as had been testified to by Lewis Hatch and Frank W. Hatch, it did not have the effect in law to vest the title of any of the property or the proceeds of the farm in Frank W. Hatch."

The jury evidently believed the testimony of Messrs. Hatch that the arrangement was substantially as testified to by them, and accordingly brought in a verdict in favor of the petitioner.

If Frank Hatch had been hired with exactly the same powers that he had at a certain rate per month, payable

in cash, we apprehend that there would not be the slightest question as to the relation between himself and the owner of this farm. According to all the cases, and according to all good sense and all ordinary human experience, a man so employed does not acquire title or possession of the farm or personalty. He does not even become a tenant. His possession is that of the owner, and he is a mere custodian for the purpose of performing the service. In such a case there would be no reason why the dominion and control of the farm and all of its belongings should not be exercised entirely by the master and employer. He would manifestly be the only one having any interest in the question as to how the farm was conducted, what crops were raised, or how profitable the business was made. The employe could be interested only to receive his stipend. The master would be interested in receiving all that the farm could be made to produce.

On the contrary, where the employe is paid by receiving a part, or as here, all of the *profits of the farm*, manifestly his own personal interest would require him to exercise a larger degree of forethought than if he were paid wages by the month, as whatever profit accrues is to be his. So in this case, if any difference of opinion existed between Frank Hatch and his father in relation to the management of the farm, it will be seen at a glance that Frank Hatch was the one having the more direct interest. He was to have the *net income derived from the farm.* The elder Hatch had allowed him, under the arrangement, to have whatever net income there was after the payment of the taxes, expenses, keeping the place stocked, and everything in repair, etc. In other words, *a motive of Lewis Hatch to exercise active super-*

vision of the farm was wanting. A motive of Frank Hatch to take a personal interest in and to determine all questions about the farm management, was continually present. The force of these reasons undoubtedly operated in the minds of both Hatch, Sr., and Hatch, Jr., and explains and more than explains all of the fine points attempted to be made by the learned counsel for the plaintiff in error. It will be seen at a glance that these considerations answer the many difficulties suggested by counsel on pages 16 to 20 of his brief, and we shall not undertake to notice all of them.

Counsel says (Br., pp. 22, 23): "Frank has paid all the taxes on both the realty and the personalty;" we say that was according to the agreement. "He has replaced farm implements that had worn out;" why not? Such was the contract. "He has kept up the stock;" this was his agreement. "Before the levy he put in bids in his own name to supply the butter factory on the farm with fuel to run the engine. After the levy he also put in these bids, but in his father's name." What has this to do with the controversy in hand? They had the right to have these bids so put in if they wished. "He purchased heifers at his own expense;" this was but keeping up the drove of milch cows. "He sold a quantity of wool to Lewis Hatch, *and if Lewis Hatch had been the manager, would he have figured in the droll attitude of purchasing his own wool?*" Frank was to have *the profits derived from the farm; the money derived from this wool when marketed, whether to Lewis Hatch or some one else, constituted a part of the profits.* "Lewis Hatch took from the farm 150 or 200 head of sheep, but subsequently brought back to the farm the same number he had taken away." Yes, and this was done without any permission

from Frank Hatch. It was a clear recognition of the right on the part of Lewis Hatch to exercise his ownership and control over his property.

(*b*)

The questions involved in this suit were very fully and carefully considered by the Supreme Court of Indiana in a case where the facts were essentially similar. We refer to the case of

Chatard v. *O'Donovan*, 80 Ind., 20.

Chatard was a bishop of a Catholic diocese of Vincennes, and as such bishop had ownership, charge and supervision of certain real estate used in part for a parish house or place of residence of priests in charge of one of the congregations of the church. In the discharge of his duties he undertook the removal of O'Donovan from the position of priest and required him to surrender possession of the real estate and building occupied as a place of his residence. The question in dispute was whether or not the relation of landlord and tenant existed between the bishop and the priest or whether it was an employment in connection with which the use of the house was a mere incident, so that the relation of landlord and tenant did not arise. The court, in deciding the question, among other things, said:

> "The question thus presented is plainly an important one, not only as the decision may affect the policy and administration of the affairs of the church directly concerned, and perhaps other church societies which furnish houses for the use of their pastors, rectors or preachers, *but the owners and occupants of real property generally;* for it is readily conceivable that in many instances the owner and the tenant will be, in all essential respects, in the

same legal relation as the parties to this record, *as, for example, the servant brought into the dwelling, or upon the premises of the employer, and, as an incident to the employment, allotted a room or tenement to occupy while the service lasts; the mechanic or laborer, who, by the terms of his engagement, has the possession or use of a house belonging to the employer*, and for which the rent is to be deducted from his wages, or for which he is to pay no specified rent, and makes compensation only by accepting less wages than he would receive if he occupied a house of his own.

While these supposed cases, like the one before us, show the parties in relations somewhat like the ordinary relation of landlord and tenant, they are yet clearly and broadly distinguishable therefrom.

The case of *Kerrains* v. *People*, 60 N. Y., 221, is instructive. It was there held that

'*Where the occupation of a house by a servant is connected with the service, or is required by the employer for the necessary or better performance of the service, the occupation is as servant, not as tenant, and the possession is that of the master.*'

In the course of the opinion in the case, Church, C. J., says:

'Such was clearly the case of *Haywood* v. *Miller*, 3 Hill., 90, where a farmer hired a man and his wife to work a farm for wages. The occupation of the house was necessary to the performance of the service; and *The People* v. *Annis*, 45 Barb., 304, was substantially the same, although I am unable to agree with the learned judge who delivered the opinion in that case, that immediately upon the termination of the service a tenancy at will, or by sufferance, springs up. * * * *The question depends upon the nature of the holding, whether it is exclusive and independent of, and in no way connected with the service, or whether it is so connected, or is necessary for its performance.* And this, I think, is the result of all the cases. The question has often arisen in England under the poor laws, to determine what occupation would confer a

settlement, the courts recognizing, as controlling, the distinction between an occupation as a tenant or as a servant.' (Cases cited.) 'The case of *Hughes* v. *Chatham*, 5 M. & G., 54, arose under the reform act, requiring a registry of voters, the statute requiring that the person should occupy as owner or tenant. * * * Findal, C. J., in delivering the opinion of the court, said: "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years or at will, or for any other estate or interest, and if he do so the servant then becomes entitled to the legal incidents of the estate as much as if it were purchassd for any other consideration. * * * And as there is nothing in the facts stated to show that the claimant was required to occupy the house for the performance of his services or did occupy in order to their performance or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services; and as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived is wrong."'

'I have cited the language of the court,' says Church, C. J., 'because is lays down concisely the correct rule for determining the question involved in this class of cases.' And, proceeding with a recital of the facts in the case before him, adds: 'The inference from these facts is reasonable, if not irresistible, in the absence of any provision for an allowance for rent, that the house was intended to be occupied by an employe for the benefit of the owner in carrying on the mill. *The case thus presented is analogous to that of a person employing a coachman or gardener, and allowing or requiring him to reside in a house provided for that purpose on the premises; or a farmer who hires a laborer for wages, to work his farm, and live in a house upon the same. In these cases the character of the holding is clearly indicated by the mere statement of facts.*"

'Many servants,' says Mansfield, C. J., in *Rex* v. *Stock*, 2 Taunt., 339, 'have houses given them to live in, as porters at park gates; if a master turns away his servant, does it follow that he cannot evict him till the end of the year?' To the same effect, see *McQuade* v. *Emmons*, 38 N. J. L., 397; *Doyle* v. *Gibbs*, 6 Lans., 180.

While it may not be said upon the facts of the complaint that the defendant was the hired servant of his bishop, *it does appear that he was appointed to his position by and held it at the discretion of the bishop, and that his possession of the property was only an incident to his appointment, the better to enable him to discharge the duties of his office*, and when, in the exercise of that discretion, which by the rules and customs of the church he had the right to employ, the bishop removed the defendant from his charge or pastorate over the congregation, his right to possession of the property at once necessarily ceased."

The case of *Wilbur* v. *Sisson*, 53 Barb., 259, is in many respects strikingly like the case at bar, including the "dairy money" which plaintiff in error seems to regard as such a *feature* in this case in the trial court. In this case one John Gamel agreed to work the dairy and land of one Conger for a period of one year from March 1, 1865; for the use of the farm and dairy, he was to deliver to Conger 9,600 pounds of merchantable cheese made at the cheese factory in Collins managed by Sisson. The milk from the dairy was taken to the factory referred to, and made into cheese; the cheese was sold and converted into money which remained in the hands of Sisson. This cheese, the defendant Sisson claims, was by force of the agreement the property of Conger to the extent of the money in controversy, and that he should be permitted to pay the money to Conger. This agreement between Gamel and Conger provided that Conger should

furnish good dairy cows to the number of fifty; that Gamel should work the land that should be occupied by the cows: the cows were to be at the risk of Conger during the year, and if any of them should be injured or unavoidably die, Gamel should pay the damages occasioned by such injury and replace such as should die. He was to work the land in a good, faithful, farmerlike manner, and raise all the grain, corn and grass that he could with good, faithful tillage of the land. He was to pay all taxes, except the county taxes, was to build certain fences and keep the premises in repair. The compensation of the owner was to be one-half of the grain raised, 100 bushels of apples from the orchard, and 9,600 pounds of cheese. The court in construing *this contract, said that it was not a lease; that Gamel did not become a tenant, and that the title of the property —referring to the cheese in controversy— was in Conger, the owner of the farm.* The court, among other things, said:

> "The terms of this description are somewhat peculiar, and it has therefore been said that in the construction of them courts should not tie themselves to mere words, 'the substance should be looked at, and that as it would be universally understood among farmers as an agreement between owners and occupants, that the latter should come in rather as servants than tenants, each party taking an interest as common owners in the crops and other products as they accrue, by way of compensation to the owners for the use of their farm, and the occupiers for their labor' (per COWEN, J., in *Putnam* v. *Wise*, 1 Hill, 247). * * * In this class of cases, the rule is well settled that the occupant does not become a tenant, and that the agreement between him and the owner is not to be construed as a lease. (*Caswell* v. *District*, 15 Wend., 379; *Dinehart* v. *Wilson*, 15 Barb., 595.) Where the agreement is of such a nature as to constitute a tenancy as distinguished

> from an occupancy to work the land on shares, there the products become the property of the tenant, and he may sell or dispose of them as he may choose. * * * The fact that Conger was to receive a fixed and specific quantity does not impair his rights as the owner of it. For the agreement, by providing that Gamel should own only the residue, as it does in effect, excluded him from owning any part of Conger's share. It was competent for the parties so to agree, and having done so, it necessarily left Conger the owner of all that was produced by the dairy."

If the conclusions of the court in this case are sound their application to the case at bar would seem to be very plain. This decision is also good authority against another point on which counsel for plaintiff in error has laid much stress. The court, among other things, said:

> "The stipulation that the occupant should pay all the taxes but the county tax and should build certain fences and keep the premises in repair, are as consistent with one relation as they are with the other, and are entitled to but slight, if any, consideration in the disposition which should be made of the case."

The relations here referred to were that of landlord and tenant on the one hand, and that of master and servant on the other.

In the very late case of *Bowman* v. *Bradley*, 151 Pa. St., 351 (17 Law Rep., Anno., p. 216), the case is stated by the court, as follows:

> "The facts on which the question arises are mainly undisputed; they show that Bradley owned a farm in Dolphin County, containing about twenty-nine acres; about four or five acres of this were occupied by a mill and pond operated by the owner; to care for the balance and the stock upon it, he hired Bowman and his family; the farm work and

the care of the cattle were to be looked after by Bowman; his wife was to milk the cows; his son was to deliver the milk each morning to Bradley in the City of Harrisburg; for this labor Bowman was to receive one dollar per day, and the use of the house upon the premises to be occupied by himself and family. The only fact in dispute was the duration of the contract. The plaintiff alleged that it was to continue for one year. The defendant asserted that it was terminable at his pleasure. * * * *Which was the true version was a question for the jury. If they found with the defendant, that was the end of the plaintiff's case, unless by some arbitrary rule of law the employe was turned into a tenant for years.* On the other hand, if they found the contract was for one year, the plaintiff was entitled to recovery unless the defendant should show a sufficient reason for terminating it sooner. The first question, therefore, that presented itself on the trial, was the nature and extent of Bowman's right to the house from which he was ousted by the defendant. Was that right and extent of the hireling a contingency upon the relation of employer and employe, or had it an independent separate existence so that he was to be treated as a tenant for years, with the right to retain possession for one whole year whether he remained in the employment of the owner or not? *This was a question of law. The terms of the contract, so far as the parties differed, it was the duty of the jury to determine. But the terms being fixed, their legal import was for the court to declare.* This should be determined upon the construction of the nature and purpose of the contract and the character of the business to which it relates. * * * *The house was a convenient place for the residence of the laborer; the house, the barn, the lane, the cattle, the farming tools, were turned over into the custody of the man who had been hired to care for the property, but he had no hostile possession, no independent right to possession; his possession was that of the owner whom he represented, and for whom he labored*

> *for hire.* * * * In all these cases and others that might be enumerated, the occupancy of the room or house is indispensable to the employment; the employe has no distinct right of possession, for his possession is that of the employer."

This case is a valuable authority on several points involved in the present hearing. In the first place, it merely announces what is fundamental, viz: That the questions of fact are for the jury. The facts in the present hearing have been found in favor of the defendant in error. This is the end of the case of plaintiff in error, if the finding of the jury were based upon proper instructions from the Court. This goes without saying. A very large part of the brief and argument of counsel for plaintiff in error, is in relation to what facts are shown by the evidence and to show that the jury incorrectly found the facts. This line of argument here is quite out of place.

Counsel insists (Brief, p. 28) that there was "evidence at least tending to prove a tenancy, and if there was such, did not the court err gravely in telling the jury that the contract made the parties master and servant? Was not the refusal to permit the jury to decide this issue of facts a palpable invasion of the rights of the jury and an utter denial of justice to the respondent? If there was such an issue to be determined, what can your Honors do but reverse this judgment?" This case holds that the question as to whether or not there is a "*tenancy*" in any given state of facts is *a question of law*, hence for the court.

Counsel magnifies and reiterates the alleged fact that Frank Hatch *said* he was a "*tenant.*" If Frank Hatch made such statement, he merely stated a mistaken conclusion of law, if the word tenant be used in its common technical sense. In a broader sense the word tenant

means *anyone holding property*, either personal or real. It means a *holder*. This is the sense in which the word is used in the case in the 34 Ill. App., 357, ~~cited by counsel and which is about the only case on which plaintiff in error seems to rely. (Brief, p. 27.)~~ In that case the definition of Webster of a tenant was approved; that definition sets forth the two shades of meaning of the word, viz.: The technical meaning of a tenant, "One who holds or possesses land or other real estate by any kind of right, either in fee simple, in common, or in severalty, or for life or years or at will," and the broader meaning of the word, "One who has the occupation or temporary possession of land whose title is in another." The controversy in this case related to the payment of some insurance which the company was trying to avoid, on the technical ground that the property insured was not in "the possession of a tenant," as stated in the policy, but the court held party holding the property was the tenant. It will be seen that the question thus adjudicated had no bearing whatever upon the question here presented; further, that it was an attempt by the insurance company to avoid the payment of insurance money solely on an extremely technical ground.

Before further proceeding to cite and discuss the cases which we regard as authorities, the attention of the court is particularly invited to the fact that in nearly all of these cases hereinafter cited the facts were different from the case on hearing in this one important particular, namely, *in nearly every one of these cases the farm or dairy or plantation was in the exclusive occupation of the party alleged to be the tenant.* In one of the cases the farm so occupied is referred to as the "*lower farm*," the owner living upon the "upper farm." On the con-

trary, in the case on hearing, *the farm was all the time in the possession of Lewis Hatch, he residing thereon in his homestead place, with the barns and out buildings about it. Frank Hatch resided, for a considerable portion of the time, in the house of Lewis Hatch, with him, Frank and his wife both residing there a part of the time after his marriage, and afterward having moved into what is called the "little house" a few rods distant from the house of Lewis Hatch;* so that the force of all these cases as authorities herein are greatly reinforced by this one important fact, namely, *that Lewis Hatch always resided on, and we say had personal, actual possession of* this farm.

In the case of *School District* v. *Batsche*, 106 Mich., 330 (64 N. W. Rep., 196), it appeared that Batsche occupied the lower floor of a two-story building. The building belonged to the school district, and the upper floor was used for a school room. In 1885, Batsche was employed to teach the school for seven months, and in pursuance of the contract took possession of the building and continued to teach the school throughout the term, and remained there afterward and from that time until the bringing of this suit, and remained in possession. That every year the district had contracted with him and he had taught the school. The school term ended in June, 1892, and on August 31, 1892, notice to quit was served.

> "The case turned in the court below upon the question of whether the relation of landlord and tenant existed. The Circuit Judge, being of the opinion that it did not, directed a verdict, and plaintiff brings error. Numerous questions are discussed in the brief of the complainant's counsel, but we think it cannot be fairly said that the Circuit Judge was called upon to pass upon anything more than the

simple question of whether the relation of landlord and tenant existed."

The Court, in its opinion, among other things, says:

"*It is fairly inferable that the statement made by plaintiff's counsel below that the occupation of the premises was incident to, and deemed essential for, the performance of the duties of the defendant as teacher. It was not proposed to show that there was a distinct letting of these premises occupied by defendant, or that any rent was received. It has been held that under such circumstances the occupant's possession is that of the employer, and that the relation of landlord and tenant does not exist. Rex* v. *Inhabitants of Chestnut*, 1 Barn. & Ald., 473; *State* v. *Curtis*, 4 Dev. & B., 222; Stock's case, 2 Leach, 1015; *Haywood* v. *Miller*, 3 Hill, 90; *Kerrains* v. *People*, 60 N. Y., 221. The case last cited is well reasoned, and, we think, notes the proper distinctions. It states: 'The case of *Hughes* v. *Parish of Chatham*, 5 Man. & G., 54, in which it was said: There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring upon him an interest in real property, either in fee, for years, or at will; and if he do so the servant then becomes entitled to the legal incidents of the estate, as much so as if it were purchased for any other consideration.' *But in* the main case *the Court held that, where the occupancy of the house was for the purpose of enabling the servant the better to perform the service, the occupancy was that of the master, and not of the servant.* We think that this is the rule in a case where, as in the present, there was no letting in terms, no rent reserved *and where it is clear that the purpose of the occupancy was to enable the employe to perform the service of his employer.*"

In the case of *Kerrains* v. *People*, 60 N. Y. (15 Sickles), 221, Kerrains had been for several years in the employ of Isaac Son. He lived in a dwelling house be-

longing to a certain mill property owned by Son. In 1871 a new agreement was made by which Kerrains was to work for Son one year "if they could agree." Son was to pay him thirteen shillings per day and furnish Kerrains with a house. The latter was to work at whatever Son had for him to do, the same as he had for years before. Subsequently Son demanded of Kerrains certain service, which he refused to perform. Son discharged him, paid him up and told him to leave the premises. Kerrains refused. Son and some other persons under his direction were proceeding to remove Kerrains' furniture and belongings when an altercation arose and Son was attacked and injured by Kerrains. "The Court charged, among other things, in substance, that the person occupied the house as a servant, not as a tenant; that Son had the right to possession and to remove the person with his effects, and to employ all the necessary force for that purpose."

CHURCH, Ch. J.:

"*The principal question of law contested on the trial, and expressly argued in this court, is whether the relation of master and servant or landlord and tenant existed between the prisoner and the prosecutor, Mr. Son, in respect of the house occupied by the former.* * * * *If the relation of master and servant existed, it would follow that the legal possession of the house was in the prosecutor, and he had the right to remove the furniture and goods therein, and to employ the necessary force for that purpose.* * * * The defendant stated the contract to be that he was to work for Mr. Son for a year at thirteen shillings a day, and have the use of the house he lived in and garden for that period. There was no dispute but that the defendant was to have the house in which he then resided. It does not appear whether the wages were less by reason of furnishing the house, or whether any, or what allowance was in-

tended on that account, *nor does it distinctly appear whether a residence in that particular house was necessary to the proper discharge of the duties of the defendant. If the occupation is connected with the service, or if it is required expressly or impliedly by the employer for the necessary or better performance of the service, then it is for his benefit, and he continues in possession. Such was clearly the case in Haywood* v. *Miller, 3 Hill, 90, where a farmer hired a man and his wife to work a farm for wages.* The *occupation of a house was necessary to the performance of the service.* And *The People* v. *Annis*, 45 Barb., 304, was substantially the same. * * * The circumstance that the right of occupation terminates with the abrogation of the contract of service by consent, or by the discharge of the servant, is not decisive. The question is, what was the character of the holding under the contract? * * * *The question depends upon the nature of the holding, whether it is exclusive and independent of and in no way connected with the service, or whether it is so connected or is necessary for its performance.* And this I think is the result of all the cases.

The question has often arisen in England under the Poor Laws, to determine what occupation would confer a settlement. The courts recognize as controlling the distinction between an occupation as a tenant or as a servant. * * *

The inference from these facts is simple, if not irresistible, in the absence of any provision for an allowance of rent, that the house was intended to be occupied by an employe for the benefit of the owner in carrying on the mill. *The case thus presented is analagous to that of a person* employing a coachman or gardener and allowing or requiring him to reside in a house provided for that purpose on the premises; or a farmer *who hires a laborer for wages to work his farm and live in a house upon the same. In these cases the character of the holding is clearly indicated by the mere statement of the facts.*"

In the case of *Haywood* v. *Miller*, 3 Hill, 90, which is

cited in the foregoing opinion, it appeared: Haywood was a farmer, owning two farms several miles distant from each other, one of which was called the upper and the other the lower farm. On the 16th of March, 1839, Haywood and Miller entered into a written contract, by which Miller agreed that he and his wife would labor for Haywood one year; "he (Miller) to labor on farm, etc., and she (Miller's wife) to discharge the duties of housekeeper, etc., term of labor to commence on the 1st of April, 1839." The contract further provided that Haywood should pay Miller for the services thus to be rendered, $160. There was a dwelling house on the *lower* farm, into which Miller and his wife moved on the 1st of April, 1839, taking with them their household furniture, and commenced their labor. Haywood aided in the removal. The court below allowed parol evidence to be given on the part of Miller that the farm intended by the written contract, and on which he and his wife were to labor, was the *lower* farm.

In the course of the summer of 1839, Haywood desired Miller to perform some labor on the upper farm, which the latter declined. Differences arose between the parties, and Miller became irritated and threatened to injure some of Haywood's cattle. Haywood, becoming dissatisfied, gave Miller notice to leave his service, which Miller declining, Haywood entered the house and put Miller's furniture out of it.

The court charged the jury that neither Miller's refusal to work on the upper farm, nor his threats of injury to the defendant's property, constituted a violation of the written contract. That the lower farm being the one intended by the contract, *it created a tenancy for the*

year; and Haywood had no right to interfere with the possession of the house or remove the goods.

The court said:

> "*The contract was not in the nature of a lease.* Whether the lower farm was intended as the place of labor or not *the relation between these parties was merely that of master and servant.* True, it is assumed by the contract that the defendant below should furnish a house; and so does every master agree to furnish a house, or house room, which is the same thing, for his domestic servants. It does not follow that, when he becomes dissatisfied and gives his servant warning to depart, and the latter refuses, that the master may not turn the servant away and remove his goods. To be sure, the master does this under the peril of paying damages for a breach of the contract with his servant, if he cannot show good grounds for dismissing him. But he is not a trespasser, whether he have good cause or not. Here the labor was to be on a salary of so much for the year. Suppose the plaintiff below had refused to work and held over the year; could the defendant have distrained for rent, or sued for use and occupation? Or could the plaintiff have had ejectment for the ouster within the year? Clearly neither; and that shows there was no more a tenancy created, than there would be under any other retainer for a year's service."

In the case of *Brown* v. *Scott*, 7 Vt., 60, the opinion of the court (which sets out the facts) was as follows:

> Collamer, J.—"The first question raised in this case is, was the property so taken as to amount to a trespass? It appears that the defendant, as an officer, sold the hay on execution. This is within the the case of *Hart* v. *Hyde*, 5 Vt. Rep., 328, and must follow that decision.
>
> The principal question however, is, was this hay the property of the plaintiff, or his father? It seems that the plaintiff purchased a farm to furnish a home for an indigent father and put on tools, stock, etc.,

and suffered the father there to labor and live. It is now insisted that the father was a *tenant* to the son, and so became the owner of all the crops on the place, and that the same were subject to be taken on the father's debts. The court will be slow to give a *bona fide* support, furnished by a son to a father, such artificial names and technical character as shall in effect discourage and fustrate such praiseworthy objects. *To create a tenancy there must be some parting with the possession so as to give exclusive occupancy to the tenant, at least for the time* being. Nothing of this kind was shown in this case. The father was suffered to reside there. *Now, to hold this a tenancy, and make the crops there the property of the father, would be forcing upon the affair a character never designed by the parties, and evidently at war with the legitimate design* The true object is obvious, and the legal character should be holden by the courts to correspond, that is, the plaintiff is the owner of the farm, stock, tools and crops, and has never parted with possession. He is by his father in constructive possession at any time. This entitles him to maintain trespass. It appears the plaintiff had said, if more could be raised than was necessary for the father's support, he was willing it should go on his debts. This did not vest the title in the father, or subject it to attachment as his. It does not appear that even enough for the support was raised.

Nor do the facts offered by defendant seem to alter the case, had the proof been admitted. He offered to show that the father had sold off the crops and had purchased stock on the farm for which the son gave his note. This only tended to prove him the agent of plaintiff, not owner of the property; and had it been shown that the father had purchased the horse and given his own note, it would but have made him the owner of that horse, not of the hay. Much stress is laid by the defendant's counsel on the law of emblements. That only arises where a *tenancy* is shown, and there does not extend to grass.

This case is not to be drawn in precedent to give

protection to *fraudulent* transactions. Had any testimony been offered, tending to prove the purchase money had in whole or in part belonged to the father, or that he had been for a long time in exclusive possession, and by valuable labor added greatly to the farm and stock, and was secreting his property from his creditors, by his son's assistance, it would have deserved a different consideration and course of proceeding; but the case is destitute of all circumstances of that character."

The case of *Peters* v. *Smith*, 42 Ill., 422, was in some respects like the case at bar, and the language of the opinion (a part of which we quote) is as follows:

"Is the possession of property, for three or four years under a loan, a fraud on creditors, such as will render it liable to execution against the borrower? Or may the ownership and the *bona fides* of the transaction be shown to defeat a levy and sale? In this case no attempt, beyond the transaction itself, is made to prove it fraudulent. *It appears that defendant in execution, having failed as a merchant, in Ohio, and having surrendered his property to his creditors, came to this State and went on a farm owned by his wife, given to her by her father; that his brother purchased and placed in his hands about five hundred dollars worth of property, consisting of stock and utensils suitable for conducting a farm; that, between three and four years afterward, one of the creditors sued Wm. S. Peters on a debt contracted by him while engaged in merchandising in Ohio, recovered judgment, issued execution and had it levied on this property. It appears that defendant in execution, during the time he had it in his possession, used it and sold portions of it, as owners of such property usually do. But the neighbors seem to have known that it was claimed to belong to appellant.*

* * * * *

The rule seems to be equally well settled, that stock in the hands of an agister may be held by the

true owner, as against the creditors of even vendees of the agister. *Property hired or loaned for temporary use falls within the same rule; and no reason is perceived why a farmer may not hire or borrow stock and implements to carry on his business*, or why the wealthy may not, of their abundance, leave their property to a poor neighbor or relative, to enable them to obtain a livelihood, *without forfeiting the ownership.* To so hold would cut off all the aid that may be kindly extended by the affluent to the industrious poor, who are willing, but unable, to contribute to the production so essentially necessary to the support and well being of society. The prosperity of communities is, in this manner, advanced perhaps to an equal extent as in other cases of bailment, which is fully sanctioned and protected by the laws of all countries.

It is, however, urged that William sold a portion of the property placed in his hands, and that this is evidence of fraud. *He states in his testimony that such was the fact, but that he replaced it with other property for appellant. He, however, states that he had discretionary power in the management of the property, and acted for his brother.* This was not inconsistent with the use or reservation of the property by appellant, if made in good faith, and he states that he had no interest in, or owned any portion of, the property."

The case of *McCutcheon* v. *Crenshaw*, 40 S. C. Rep., 511 (19 S. C. Rep., 140), the facts were in many respects very similar to the case at bar.

McCutcheon, the owner of a farm, made a contract with certain persons, among whom was Adam Jefferson, which in part was as follows:

"We, the several undersigned including said Adam Jefferson), do obligate to take in charge the several plats or parcels of land to be designated by the above named J. E. McCutcheon, of the first part, and to plant, cultivate and manure such lands

according to his or his agent's directions. We are to be of good moral behavior while on the place, and see that there is no disorderly conduct on the place. We are to be respectful to the proprietor and his family and agent. We are to house in the best possible condition all the several crops raised on said lands by us severally and see that no portion thereof is removed from the place until after all advances made by him for us and the several amounts set opposite our respective names are deducted by him therefrom. In consideration of the above obligation being carried out in good faith, I, J. E. McCutcheon, do agree to give unto the several parties the entire crops raised by them after deductions of all advances made by me for them and the amounts opposite each of their respective names."

Crenshaw & Co., through levy of an agricultural claim, under the laws of South Carolina, had by E. Scott Carson, as sheriff, seized possession of a portion of the crops under an assignment from Adam Jefferson as an alleged tenant of the former. The Court, among other things, in its opinion, says:

"In the case of *Carpenter* v. *Strickland*, 20 S. C., 1, it was settled that, under our agricultural lien law, a contract to pay a farm laborer wages for his work, whether in money or a part of the crop, did not make him 'a cultivator of the soil,' in the sense of the act: that is to say, make him a tenant, with the right of exclusive possession and control within certain prescribed limits, and for a fixed period. But, on the contrary, the laborer, in such case, has no interest in the crop of the employer, which he can take into his possession or incumber, until the crop is divided, and the claims of the proprietor paid. See *Rogers* v. *Collier*, 2 Bailey, 581; *Richey* v. *Du Pre*, 20 S. C., 1; 4 Am. & Eng. Ency. Law, pp. 887, 902, where, citing our cases of *Carpenter* v. *Strickland* and *Richey* v. *Du Pre*, it is said: '*One who is hired to work land, receiving for his compensation a part of the crop* (*land*), *is*

*not a tenant. He has no estate in the land, but receives his share of its fruits as the price of his labor. The possession is still in the owner of the land. * * * the possession of the cropper being that of a servant, who gains no property in his share of the crop until the division which is made by the landlord,'* etc. It was the duty of Judge Hudson to construe the written contract between the parties, and we concur in his construction. We agree that under the contract of January 1, 1892, *Adam Jefferson was not a tenant or any part of the plantation of McCutcheon*, so as to enable him to give a binding lien in advance upon any crops he might make during the year, but a mere farm laborer working for him."

In the case of *Paige* v. *Akins*, 112 Cal., 401 (44 S. E. Rep., 666), the head note to the decision reads as follows:

"It appeared that defendant had been for several years foreman in charge of all plaintiff's lands, with authority to rent the same, and negotiate the purchase and sale of land; that in 1891, a tract of 500 acres was subdivided for purposes of sale; that prior to the subdivision, 350 acres of this tract had been leased for the planting of a crop in the winter of 1891, which would not mature till 1892, and that the tenant had summer-fallowed the same in the spring of 1891; that at defendant's suggestion, plaintiff purchased the summer fallow from the tenant; that as plaintiff's foreman, defendant had authority to cultivate lands for plaintiff's benefit; that November 21, 1891, defendant wrote plaintiff, 'There is 350 acres of summer-fallow; * * * I will need seed wheat put it in,' and again, December 1st, 'What shall I do with the summer-fallow?' that not till two months after he began seeding the land was there an intimation that defendant was putting it in on shares; that plaintiff paid for the labor employed in putting in the crop, and furnished the seed. *Held, that the evidence was insufficient to establish the relation of landlord and tenant.*"

In the case of *State* v. *Curtis*, 20 N. C., 226, which was a criminal prosecution growing out of facts in many respects similar to the case on hearing, the Court, among other things, said:

> "It is obvious, therefore, that Pope was put to lodge in the room at the mere will of his master; and that this was for the more convenient performance of the service to be rendered by him as a domestic, and for that reason only. There was no severance of this from the other parts of the premises; and we think clearly that Pope had no possession of his own, but that his possession, as servant, was just as much the possession of his master as if they had occupied separate rooms under the same roof. *Rex* v. *The Inhabitants of Cheshire*, 1 Barn. & Ald., 473; Stockles' and Edwards' case, 2 Leach C. C., 1015, and R. & R. C. C., 185. It the latter case, Lord Ellenborough remarks that a servant who lived with his family in particular rooms of his master's house, by his leave, could not maintain trespass against his employers if they entered the rooms without his consent; and he asks, 'does a gentleman, who assigns to his coachman the rooms over his stables, thereby make him a tenant?' In the same case, Mansfield, Chief Justice, uses this language, 'many servants, as, for instance, porters at park gates, have rooms assigned to them to live in; and surely, if a master choose to turn away his servant, it does not follow that he cannot evict him until the end of the year.' A very common instance of this relation in this state exists in the case of employer and overseer. *Certainly, it has never been understood among us, when a planter places an overseer on his plantation to superintend his operations and hands there, that he puts him into possession as against himself, so that he cannot turn him off during the year, but that the overseer may remain against the will of the master in possession, perhaps of the only house fit for the occupation of a second overseer or of the owner himself. On the contrary, it is clear law, and universally received, that the houses on the plantation are as*

much in the possession of the owner as the plantation itself, or the hands, provisions or horses on it, and it would work an intolerable inconvenience to employers and detriment to agriculture to hold otherwise. The redress of the overseer is by action on the contract of the employer, and not by holding over that *which was never in his possession for an instant, but as the servant and agent of his employer.* So, in the present case, Mr. Curtis never parted from or lost his possession; and consequently, the house was never in possession of Pope."

In the case of *People* v. *Annis*, 45 Barbour, 305, the Court, among other things, says:

> "The agreement is this: The defendant hired the relator to work for him one year on his farm, for the sum of $270, and was to furnish him house room for himself and family, a garden and pasture for a cow. It is very clear, I think, that this is no demise of premises in the nature of a lease, creating the relation of landlord and tenant. The relation is simply that of employer and employe, or master and servant, and the house room, garden and pasture of the cow are parts merely of the contract for service, and operate as a portion of the consideration of that agreement. No rent is reserved or intended, and there could be no such thing as a claim by the owner for use and occupation while the agreement continued in force and the parties acted under it. *It is simply the case of a hired man living with his employer, or upon his premises, as such. To call this a tenancy would be a confounding of all legal distinctions.*"

The case of *Rollins* v. *Riley* (reported in 44 New Hampshire—7 Chandler, 12) was this: A father and mother who were growing old made an instrument called a covenant, to stand seized to the use of the son, which was in part as follows: "We will henceforth stand seized of our homestead farm, containing forty acres more or less * * * with all the privileges and ap-

purtenances to the same belonging, for the uses and purposes following, that is to say: To our own use during our natural lives and the natural life of the survivor of us * * * and after our decease or the decease of the survivor of us, to the use of the said George W. Rollins (the son), his heirs, and assigns forever; provided, however, that if the said George W. Rollins shall neglect or refuse to maintain us and the survivor of us during our natural lives upon said premies, and find and furnish for us and for the survivor of us all such proper and necessary food, meat, drink, clothing and medicine, according to our degree and standing, and to maintain us and the survivor of us during our natural lives and the natural life of the survivor of us, properly and fully, upon our allowing him the use of said farm and the easterly half of the house, then this conveyance shall be void." In discussing this agreement, the Court, among other things, said:

> "But the defendant claims that the terms of the condition to the deed by which he was to be allowed the use of the farm and half the house so long as he maintained the plaintiff and his wife, made him a tenant at will or at sufferance, and that, therefore, the plaintiff cannot maintain this suit without a notice to quit, or without a re-entry by the plaintiff. But we do not so understand the contract. *It seems evident, from the whole deed, that the plaintiff intended to keep the possession in himself, and the right of possession, and that the arrangement that George W. was to be allowed to have the use of the farm and half of the house did not make him a tenant in any respect to his father, so as to give him the legal possession.* * * * When George W. failed to perform his agreement in furnishing the plaintiff with clothing, then his right to have the use of the land ceased, and after that the plaintiff, being in possession, could sue in trespass for any subsequent interference with the land or house."

The case of *Mayhew* v. *Suttle*, 82 Eng. C. L. Rep., 348, was this: A party acquired the right, under an agreement with the owner of certain premises, who was a brewer, to have the possession of the premises for the purpose of conducting a place for the sale of beer. The occupant agreed that he would purchase beer from no other party than the owner of the premises. It does not appear that he was to pay any rental for the premises, or to render any compensation for the use of the same other than was included in the purchase of the beers of the party who owned the premises, and that said agreement might be terminated at any time upon one month's notice by either party, and that thereupon the occupant should "*quit and deliver up to him, the said G. Suttle (the owner), said trade or business, and the full, quiet and peaceable possession of all and every of the said premises, together with such fixtures, goods, effects and things belonging to him, the said G. Suttle, as may then be thereon.*" The question was whether he was the tenant of the owner, or whether the relation created was that of master and servant. The court said:

> "We think, for these reasons, that the agreement in question did not create any tenancy, but that the occupation of the tenant was ancillary to the carrying on of the trade for and on account of the defendant, and that the plaintiff, therefore, had no such possession as to enable him to maintain this action (of trespass)."

In the case of *King* v. *The Inhabitants of Cheshunt*, 1 Barnewall & A., 473 (1818), it appeared that one John Blackerby, by order of two justices, was removed from a certain parish to another parish, in the County of Hertfort; that said Blackerby "was a laborer in the employ of the Board of Ordnance, in the gunpowder manufactory

at Waltham Holy Cross. After residing upwards of two years in a house in that parish at an annual rent of seven pounds, it was purchased by the board, and a part of the premises having been taken from it, he continued to live in it at a weekly rent of two shillings, which was deducted from his wages. The Board of Ordnance had several other houses in Waltham Holy Cross for their laborers, who paid rents for them, but inhabited them so long only as they continued in the employment of the board. When Blackerby was dismissed from the emplo ment, he was required to give up the keys to the house, which he at first refused to do, but after a short time gave them to the person appointed to succeed him in the house by the superintendent. During the time he so held this house at two shillings a week he also occupied, for a space of time exceeding forty days, a shop in the same parish, the shop and house together being of the annual value of ten pounds. The Court of Quarter Sessions were of opinion that the occupation of the house under the above circumstances did not operate in aid to confer a settlement within the meaning of the 13 & 14 Car. 2, c. 12.

Lord Ellenborough, Ch. J., said:

"In this case, it seems to me, that the party occupied this house as a servant only, and not in the character of a tenant. It is like the case of a coachman, who frequently occupies a room over the stables; but such occupation is not within the meaning of 13 and 14 Car. 2. (Blackerby) here was divested of the tenement as soon as his service terminated. He quitted the possession reluctantly, and was succeeded by the person who succeeded him in his employment under the Board of Ordnance. *All this clearly shows that he was entitled only to hold it during and for the more convenient performance of his service. If the court should hold, in this and similar cases, that the legal relation of landlord and tenant subsisted, it*

would become necessary to turn such persons out of possession by regular proceedings in ejectment, and every gentleman having twenty or thirty cottages in which his laborers resided would be compelled, on any change of their service, to have recourse to such means. This would be productive of the most serious inconvenience. Upon the whole view of this case, I think it plainly appears that the relation of landlord and tenant never did subsist here, and unless that were so, this was not an occupation within 13 and 14 Car. 2, and no settlement could be gained by it."

In the same case, BAYLEY, J., says:

"I am of the same opinion. The case of *The King* v. *Minster* only decided that *the occupation of a tenement, which was wholly unconnected with the service, would confer a settlement, but that the occupation of one connected with the service would not.*"

ABBOTT, J., also says:

"*Here the relation which existed was only that of master and servant, and not that of landlord and tenant.*"

In the case of *The King* v. *Stock and others* (2 Leach's Crown Law, 1015, 1809) certain parties had committed a robbery on a banking and brewery company. The bank building consisted of two stories. There were three rooms in the lower story, the first occupied for the transaction of the brewing business of the company; the next room was occupied by the banking business of the company, and the interior room was a private office. Overhead, on the second floor, were tenement rooms occupied by one Stevenson, who was an employe of the bank. There was no communication between the upper and lower stories, except through a trap-door. These tenement rooms were occupied by one Stevenson, who was a cooper employed by the company. He was paid a stated price per week, and it was further agreed that he should

have the upper rooms of this building for himself and family. On the trial of the indictment, the question was whether or not these dwelling rooms were in the possession of the banking company, so that it was the constructive dwelling of the prosecutors.

LORD ELLENBOROUGH said:

"This man Stevenson certainly could not have maintained trespass against his employers if they had entered these rooms without his consent. Does a gentleman, who assigns to his coachman the rooms over his stables, thereby make him a tenant? * * * *Stevenson was a servant, for the property in both partnerships belonged to the same persons.*"

LORD MANSFIELD, Ch. J., in the same case said:

"*The prosecutors could have turned Stevenson out of these premises whenever they pleased. He was their servant, who, like many other servants*, as, for instance, porters at park gates, had these rooms assigned to him to live in, and surely, if the master chose to turn away his servant, it does not follow that he cannot evict him until the end of the year."

The case of *Doe* v. *Derry* (9 Charrington & P., 499):

"The said N. D. agrees with the said J. F. C. to manage the farm at Bishop's Frome, now in the occupation of the said N. D., which he has this day, with the consent of the mortgagee, let to the said J. F. C. from the 25th of December, on the following terms, namely: The said N. D. is to manage and take care of the stock and crop on the said premises, and the team of horses, and do every necessary work on the said farm, and the wife of the said N. D. is to manage the dairy thereon for the said J. F. C., the said J. F. C. allowing to the said N. D. the sum of 12s. per week, and allowing him and his family to reside and have the use of the dwelling house and furniture therein, free of rent, and the said N. D. hereby agrees to the terms above mentioned, either party to put an end to this agreement on giving

three months' notice or paying or receiving three months' wages, the said N. D. to keep and render monthly to the said J. F. C. a just and true account of all articles sold and moneys received and paid by him, the said N. D., on account of the said J. F. C., relating to said farm."

PARKE, B.: "If this be a lease, the stamp is not sufficient; it should be £1 15s. But it seems to me that *this is not a lease at all*, and that this is only a means of remunerating the defendant as bailiff. The words 'allowing him and his family to reside and have the use of the dwelling house,' might import a lease; but, I think, taking the whole of the instrument together, they must be taken to be a reward for services."

1 Wharton on Ev., Sec. 357.

(c)

The ~~defendant~~ plaintiff in error requested the giving of only two instructions, which the court refused to give. One of these was so manifestly bad that no complaint is now made of the refusal. The other instruction was properly refused because there was no evidence to support it. This instruction is found on page 23 of the record, and is as follows:

"The court instructs the jury that when a man delivers personal property to another man, under a contract which provides that the person to whom such personal property is turned over is at liberty to deliver to the person so turning over said personal property, other property of like kind and equal in value, then the title to the property so delivered passes to the persons so receiving said personal property; and if the jury believe from the evidence that the petitioner, Lewis Hatch, and the judgment debtor, Frank W. Hatch, entered into a contract which, provided that the farm personalty on

> the Lewis Hatch farm should be delivered by Lewis Hatch to Frank W. Hatch, and that such contract further provided that Frank W. Hatch need not return to Lewis Hatch the same specific articles of property, but that Frank W. Hatch was at liberty under said contract to deliver to the said Lewis Hatch other personal property of like kind and equal in value to that to be delivered by the said Lewis Hatch to the said Frank W. Hatch, and you further believe from the evidence that under said contract the farm personalty on the Lewis Hatch farm was delivered by the said Lewis Hatch to the said Frank W. Hatch, and that said contract was in force between the said Lewis Hatch and the said Frank W. Hatch at the time of the levy of the execution in the case of *Joseph G. Heim, Receiver of the First National Bank of South Bend*, v. *Frank W. Hatch*, then you should find by your verdict that the property levied upon was the property of Frank W. Hatch and liable to seizure under said execution."

It will be observed that this instruction applies to a case where one man "delivers personal property to another, under a contract which provides that the person to whom such personal property is turned over is at liberty to deliver to the person so turning over said personal property or other property," etc. The evidence in this case, considered in its mere verbal form, directly contradicts the idea of their having been any property turned over to Frank W. Hatch. Lewis Hatch, in answer to a question, testified:

> "A. I did not turn over anything about it. There was not any turning over anything. He just came to manage my business. There was no 'turn over,' no accounting of stock or anything of the kind."

But aside from the mere verbal form of the evidence, the whole general import and effect of the agreement or arrangement, which appears by the uncontradicted evi-

dence to have been made between the two men, precludes the idea of there having been any turning over of this property in the sense in which the term was used in the instruction, or at least in the sense in which it must have been used in the instruction, to have made it even a correct abstract statement of a principle of law.

It will also be observed that in the instruction above quoted, not only is there no mention made of any tenancy, but the instruction is confined entirely to the personal property. This instruction could have had no application except upon the theory that there was a tenancy. It is difficult to conceive how a tenancy of this personal property could have existed without there being a tenancy of the real estate—the farm upon which the personal property was situated. Yet there is not in the evidence a particle of testimony that Lewis Hatch ever relinquished his possession of the farm, or that Frank Hatch ever acquired the right to the possession of the farm as against Lewis Hatch. The instruction was properly refused.

By way of illustration of the contention of the defendant in error that the title to this property remained in Lewis Hatch and did not pass to Frank W. Hatch—suppose the next day after this arrangement was made, in 1883, an officer with an execution against the property of Lewis Hatch had appeared upon this farm to make a levy; suppose he had seized the property then on the farm and Lewis Hatch had attempted to defend by showing that this property did not belong to him but belonged to Frank W. Hatch, as the legal effect of the arrangement appearing in the evidence. Do either this court or counsel for plaintiff in error believe that under such circumstances Frank Hatch could have replevied this stock

from the officer or that Lewis Hatch could have maintained such a defense? It appears from the evidence in the case that a portion of this property levied on by the marshal was on the farm in 1883, at and prior to the time that the arrangement was made; that the same was bought with the money of Lewis Hatch and not by Frank Hatch.

In relation to the instructions given on behalf of petitioner, of which complaint is made, nothing more need be said. Their correctness is fully established in the decisions hereinbefore cited.

(d)

In conclusion we respectfuliy submit that this record is free from error and accordingly we respectfully petition that the judgment of the lower courts be affirmed.

Respectfully submitted.

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